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HJ HAFIFI HJ HASSAN

v.

NORMAN DISNEY & YOUNG SDN BHD & ORS; NORMAN DISNEY & YOUNG (INTERVENER)

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HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[COMPANIES (WINDING-UP) NO: D-28-216-2009]
9 OCTOBER 2013

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COMPANY LAW: *Liquidators - Powers of liquidator - Payment of solicitor's bills from assets of company - Whether bills must be verified by committee of inspection - Liquidator's discretion - Whether governed by r. 165 Companies (Winding-Up) Rules 1972 - Whether solicitor's bills to be taxed when appointment of solicitors was to assist liquidators - Companies Act 1965, ss. 236(1)(e) & 236(2)(a)*

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The first respondent, which was wound up on 18 March 2013, obtained a consent order at the Court of Appeal for a stay of the winding up order pending the appeal and the appointment of the provisional liquidators ('PLS'). The PLS applied for an order that they be authorised to approve and pay the solicitor's bills that would be engaged from the assets of the company. The respondents resisted the application and contended that pursuant to s. 237 of the Companies Act 1965 ('the Act'), the bills must be verified by the committee of inspection before the assets of the company could be used to pay the same. The PLS argued that since they were appointed by the court pursuant to r. 63 of the Companies (Winding-Up) Rules 1972 ('the Rules'), they were officers of the court and it was not appropriate that their actions with regards to the payment of the bills be subjected to the scrutiny of others. The PLS further argued that by virtue of r. 165 of the Rules, they had the option to ask for the bills to be taxed but this was entirely in their discretion. In support of their contention, the PLS relied on the case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor ('Wong Sin Fan')*. On the contrary, the respondents argued that pursuant to r. 173 of the Rules, the solicitor's bills could not be paid out of the assets of the company without the approval of the taxing officer. Further, it was argued that *Wong Sin Fan*'s case was an authority which held that r. 173 of the Rules should apply for the service rendered under

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s. 236(i)(e) of the Act for the appointment of the solicitors to assist the PLS. The issue that arose for determination herein was whether the PLS ought to be given full discretion in the payment of the solicitor's bill or should the bills be taxed before payment was made.

Held (solicitor's bills to be taxed):

(1) Based on s. 237 of the Act, the liquidator's conduct in the administration of the assets of a company must be consistent with the directions of the creditors, contributors and the committee of inspection and that would include payment of a solicitor's bill, as long as it comes under s. 236(1)(e) of the Act which was for the appointment of lawyers in the ordinary administrative and management duties of the liquidators' and not for litigation work under s. 236(2)(a) of the Act. (para 44)

(2) By virtue of r. 165 of the Rules, when dividend was contemplated, the PLS could then request for the solicitor's bills to be taxed. The discretion of the PLS was limited to this particular situation and was not meant for it to be applied across the board. Even when dividend was contemplated, the rule would apply in relation to a solicitor's bill only if the lawyer was engaged for court proceedings and not when it was to assist the liquidator in normal duties. (paras 41 & 42)

(3) Rule 173 of the Rules applied since the appointment of solicitors was pursuant to s. 236(1)(e) of the Act. Thus, the solicitor's bills must be taxed when the appointment of the solicitors was to assist the PLS in their ordinary duties as found in *Wong Sin Fan*. This was opposed to the appointment under s. 236(2)(a) of the Act where lawyers were appointed for legal proceedings. In the former, the bill must be taxed but in the latter, there was no requirement. Hence, the solicitor's bills must be taxed by the taxing officer and approved by the committee of inspection that was to be formed. No costs was granted for this application as the PLS merely sought direction with regards to the payment of the solicitor's bills. (paras 62, 63, 65 & 66)

Case(s) referred to:

Goh Swee Oh & Ors v. Heng Ji Keng & Anor [2011] 6 CLJ 812 HC ***(dist)***

North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors & Other Appeals [2013] 3 CLJ 1101 FC ***(dist)***

Re Micropolis (S) Ltd [1998] 3 SLR 951 ***(refd)***

Wong Sin Fan & Ors v. Ng Peak Yam & Anor [2013] 3 CLJ 17 FC ***(dist)***

Legislation referred to:

Companies Act 1965, ss. 236(1)(e), (2)(a), 237, 241, 242

Companies (Winding-Up) Rules 1972, rr. 63, 165, 173

Companies (Winding-Up) Rules [Sing], r. 173

For the provisional liquidators - Sia Siew Mun (Kwai Li Geng with her); M/s Sia Siew Mun & Co

For the respondents - Francis Tan (Sakthy Vell Saminathan with him); M/s Azman Davidson & Co

For the petitioner - KM Chan (Tan Wei Wei with him); M/s Lim Kian Leong & Co

Reported by Sandra Gabriel

JUDGMENT

Abu Bakar Jais JC:

Brief Facts

[1] The first respondent ('the company') was wound up on 18 March 2013 but a consent order was subsequently obtained at the Court of Appeal on 12 April 2013 by the petitioner and the second to the fourth respondents ('respondents') for a stay of the winding up order pending appeal and the appointment of the provisional liquidators ('the PLs') to continue on the business of the company.

[2] In carrying out their duties, by way of notice of motion, the PLs applied in this court among others for an order that they be authorised to approve and pay the solicitor's bills that they want to engage from the assets of the company.

[3] The exact wordings of the application at para. 4 of the notice of motion which this court has to consider reads:

> The Provisional Liquidators be authorised to approve Messrs Sia Siew Mun & Co.'s bills and to pay the bills from the assets of Norman Disney & Young Sdn Bhd as the Provisional Liquidators deem fit.

[4] This application is resisted by the respondents although the respondents do not object to the specific solicitor chosen by the PLs. The objection is merely on the wide discretion requested from this court for the PLs to make payment on the said bills from the assets of the company once this bill is forwarded to them.

[5] It is significant to note the appointment of the solicitor is made pursuant to s. 236(1)(e) of the Companies Act 1965 ('the Act') which reads:

> The liquidator may with authority either of the Court or of the committee of inspection appoint an advocate to assist him in his duties.

The PLs' Arguments

[6] Without missing the central arguments in support of the application, the PLs' submissions can be summarised as follows.

[7] Since the PLs' was appointed pursuant to the Court of Appeal's Order on 12 April 2013, r. 63 of the Companies (Winding Up) Rules 1972 ('the rules') ought to be considered and this provision reads:

> All liquidators appointed by the Court shall be officers of the Court.

[8] The PLs argued as they are officers of the court, it would not be appropriate that their actions with regard to the payment of the bills be subjected to the scrutiny of others.

[9] They also argued that they have the option to ask for the bills to be taxed but that is entirely in their discretion as stated in r. 165 of the rules which states:

> Every solicitor, manager, accountant, auctioneer, broker or other person employed by a liquidator in a winding-up by the Court shall on request by the liquidator in Form 84, to be made a sufficient time before the declaration of a dividend deliver his bill

A of costs or charges to the Taxing Officer for the purpose of taxation; and if he fails to do so within the time stated in the request or such extended time as the Registrar may allow, the liquidator shall declare and distribute the dividend without regard to such person's claim.

B **[10]** This according to the PLs is also supported by the Federal Court's case of *Wong Sin Fan & Ors v. Ng Peak Yam & Anor* [2013] 3 CLJ 17; [2013] 2 MLJ 629.

[11] Further, the PLs argued following *Wong Sin Fan (supra)*, in C practice solicitors' bills are not taxed.

[12] Also submitted by the PLs is that the Federal Court's case of *North Plaza Sdn Bhd v. Equiticorp Holdings Ltd & Ors & Other Appeals* [2013] 3 CLJ 1101; [2013] 3 MLJ 617 cited by the D respondents should not apply against the application now as in that case the consent order clearly stipulated that the liquidators' appointment was with a committee of inspection, unlike the case now before this court.

The Respondents' Arguments

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[13] The thrust of the respondents' rebuttal in turn is narrated below.

[14] The respondents basically submitted that there must be a F check and balance of the PLs powers in paying the said bills and only when the bill are verified and approved by the shareholders and contributories of the company or by the committee of inspection which has yet to be formed, could it be possible to use the assets of the company to pay the same, pursuant to s. 237 G of the Act.

[15] The respondents did not state under which limb this provision is quoted but the whole of this provision reads:

(1) Subject to this Part the liquidator shall in the administration H of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the I committee of inspection.

(2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.

(3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(4) Subject to this Part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

[16] The respondents also made reference to s. 241 and s. 242 of the Act and s. 241 of the Act states:

(1) The liquidator may, and shall if requested by any creditor or contributory summon separate meetings of the creditors and contributories for the purpose of determining whether or not the creditors or contributories require the appointment of a committee of inspection to act with the liquidator, and if so who are to be members of the committee.

(2) If there is a difference between the determinations of the meetings of the creditors and contributories the Court shall decide the difference and make such order as it thinks fit.

[17] While s. 242 of the Act reads:

(1) The committee of inspection shall consist of creditors and contributories of the company or persons holding:

(a) general powers of attorney from creditors of contributories; or

(b) special authorities from creditors or contributories authorizing the persons named therein to act on such a committee, appointed by the meetings of creditors and contributories in such proportions as are agreed or in case of difference as are determined by the Court.

(2) The committee shall meet at such times and places as they from time to time appoint, and the liquidator or any member of the committee may also can a meeting of the committee as the necessary.

(3) The Committee may act by majority of their members present at a meeting but shall not act unless a majority of the Committee is present.

A (4) A member of the committee may resign by notice in writing signed by him and delivered to the liquidator.

(5) If a member of the committee becomes bankrupt or assigns his estate for the benefit of his creditors or makes an arrangement with his creditors pursuant to any written law B relating to bankruptcy or is absent from five consecutive meetings of the committee without the leave of those members who together with himself represent the creditors or contributories, as the case may be, his office shall thereupon become vacant.

C (6) A member of the committee may be removed by an ordinary resolution at a meeting of creditors, if he represents creditors, or of contributories, if he represents contributories, of which meeting seven days' notice has been given stating the object of the meeting.

D (7) A vacancy in the committee may be filled by the appointment by the committee of the same or another creditor or contributory or person holding a general power or special authority as specified in subsection (1).

E (8) The liquidator may at any time of his own motion and shall within seven days after the request in writing of a creditor or contributory summon a meeting of creditors or of contributories, as the case requires, to consider any appointment made pursuant to subsection (7) and the meeting may confirm or revoke the appointment and appoint F another creditor or contributory or person holding a general power or special authority as specified in subsection (1), as the case requires, in his stead.

(9) The continuing members of the committee if not less than two may act notwithstanding any vacancy in the committee. G

[18] The respondents also relied on the case *North Plaza (supra)* to say the Federal Court in this case ruled that the committee of inspection must be consulted by the liquidator before the sale of land in that case could proceed. H

[19] Likewise in the present case according to the respondents, the committee of inspection which is yet to be formed needs to approve the said bills before it is paid out of the assets of the company. I

[20] Further the respondents argued that pursuant to r. 173 of the rules such bills from the solicitor cannot be paid out of the assets of the company without the same being considered and allowed by the taxing officer and this rule reads:

> No payments in respect of bills or charges of solicitors, managers, accountants, auctioneers, broker or other persons other than payments for costs and expenses incurred and sanctioned under rule 45, and payments of bills which have been taxed and allowed under orders made for the taxation thereof, shall be allowed out of the assets of the company without proof that the same have been considered and allowed by the Taxing Officer. The Taxing Officer shall satisfy himself before passing the bills or charges that the employment of a solicitor or other person to assist the liquidator in the performance of his duties in respect of the matters mentioned in the bills or charges has been duly sanctioned. Provided that the Official Receiver when acting as liquidator may without taxation pay and allow the costs and charges of any person employed by him where the costs and charges are within the scale usually allowed by the Court and do not exceed the sum of $100.

[21] In support with regard to this rule too, the respondents quoted the Singapore's case of *Re Micropolis (S) Ltd* [1998] 3 SLR 951.

[22] Further the respondents argued *Wong Sin Fan* (*supra*) is authority to say r. 173 of the Rules should apply for the service rendered under s. 236(1)(e) of the Act for the appointment of the solicitors to assist the PLs.

Findings Of This Court

[23] First, although the PLs submitted they were appointed by the court, nothing turns on this as whether they must be considered as court's officers or not, the issue at hand before this court is whether they ought to be given full discretion in the payment of the solicitor's bill or should the bills be taxed before payment is made.

[24] In this regard, it ought to be appreciated and not disputed that even a court's officer discretion is not unfettered. In this regard, his or her discretion must be based on law.

[25] Next to be considered by this court is the case of *Wong Sin Fan* (*supra*), an authority relied by both the PLs and respondent for different reasons as explained earlier in this judgment.

[26] It is paramount that the context upon which certain findings are made by the Federal Court in this case must be borne in mind having regard to the facts of this case.

[27] It must be recognised the facts in this case is not similar to the present case before this court on two important aspects.

[28] First, in this case before the Federal Court the solicitors' bill in question relates to work done by the solicitor for court action. It was in relation to litigation.

[29] This is different from the case before this court, where no litigation is involved. The solicitors' bill in the present case relates to application under s. 236(1)(e) of the Act as narrated earlier. In fact in the application before this court now the PLs cited this provision in their notice of motion.

[30] While in the case of *Wong Sin Fan* (*supra*) the solicitor's bill was in relation to litigation work under s. 236(2)(a) of the Act which are different from the one before this court now. This provision reads:

> The liquidator may bring or defend any action or other legal proceeding in the name and on behalf of the company.

[31] Second in the Federal Court's case of *Wong Sin Fan* (*supra*), it was clear that the appellants who sought to challenge the solicitor's bill for payment by the liquidator had agreed to the payment of the bill. This is reflected at p. 629 of the MLJ's report which says:

> Furthermore, the cheques for payment of the lawyer's bill were signed by the respondents after the appellants had approved the payments.

[32] In the present case before this court there is no agreement by anyone including the creditors or contributories that the solicitor's bills be paid. In fact this is now challenged so that before the said bills are paid by the PLs, the agreement and sanction of the committee of inspection is required.

[33] Therefore it is no surprise in *Wong Sin Fan* (*supra*) that certain findings were made and narrated as follow:

(a) that a liquidator has the discretion whether a solicitor's bill is subjected to taxed as stated in held (3) of the case, where it is stated;

> Rule 165 provided that only upon request by the liquidator that a solicitor shall deliver a bill of costs to the taxing officer to be taxed. Rule 165 is a discretionary provision which gives the liquidator the discretion whether to tax or not.

(b) in practice the solicitors' bills are not taxed, having taken a leaf from the Singapore's case of *Re Micropolis* (*supra*).

[34] This court says there is no surprise on the findings made above because those findings were made in the context that the bill in question involved a litigation matter and also because the party seeking to challenge the bill in that case had already approved the same as narrated in this judgment earlier.

[35] The findings narrated above were arrived at based on the facts as explained. It is not findings made for general application.

[36] In fact the question of law posed for the Federal Court in that case is particularised in a manner meant specifically only for the company involved in the winding-up in this particular case and it says:

> Does r. 173 of the Companies (Winding-Up) Rules 1972 ('the Rules) prohibit payment of all the solicitors bill paid by the **respondents from the assets of Folin and Brothers Sdn Bhd (in liquidation)** to their solicitors, unless the said solicitors bills have been considered and allowed by the taxing officer? (emphasis added).

[37] As clearly seen, if the question of law is for general application the words 'from the assets of Folin and Brothers Sdn Bhd (in liquidation)' would not have been used but it would have been replaced with the general words like 'company (in liquidation)'. Further, the word 'respondents' above would have been replaced by the word 'liquidators'.

[38] Also, in the face of clear provision in r. 173 of the Rules, it could not be intended by the Federal Court that no solicitor's bill should be taxed if the solicitors had been engaged pursuant to appointment under s. 236(1)(e) of the Act.

[39] In fact the respondents are also right to say this case decided that r. 173 of the Rules would apply for service envisage under s. 236(1)(e) of the Act as Zulkefli CJ (Malaya) in this case said:

> It is our considered view that the provision of r. 173 of the Rules is meant only to apply to the services as envisaged under s. 236(1) of the Act.

[40] Therefore it is clear *Wong Sin Fan* (*supra*) must be taken in its proper context and not be used as suggested by the PLs in the present case before this court to mean that the liquidators have full discretion when it comes to payment of a solicitor's bill without the need for it to be taxed.

[41] As to the submission of the PLs regarding r. 165 of the rules as narrated earlier, it is clear from the said provision, it applies in relation to the distribution of dividend. Only when dividend is contemplated will this rule apply for the PLs' in this case to request if they so wish for the solicitor's bills to be taxed. In that sense their discretion is limited to this particular situation and is not meant for the discretion to be applied across the board in any given situation.

[42] If dividend is not contemplated for distribution, the PLs' in this case cannot say they have the discretion whether the said bills should be taxed or not.

[43] Even when dividend is contemplated, this rule would apply in relation to a solicitor's bill only if the lawyer is engaged for court proceeding and not when it is only to assist the liquidator in his normal duties. This finding would be consistent in this court's view with the decision in *Wong Sin Fan* (*supra*) where the Federal Court decided this rule is to apply in that case.

[44] On s. 237 of the Act, there can be no doubt in this provision, the liquidator's conduct in the administration of the assets of a company must be consistent with the directions of the creditors, contributories and the committee of inspection and that

would include payment of a solicitor's bill as long as it comes under s. 236(1)(e) of the Act which is for appointment of lawyers in the 'ordinary administrative and management duties of the liquidators' as found by *Wong Sin Fan* (*supra*) and not for litigation work under s. 236(2)(a) of the Act.

[45] This court is also of the findings that with regard to the operation of s. 241 and s. 242 of the Act as narrated earlier, the formation of a committee of inspection and its constitution and proceedings will ensure that the PLs' action regarding the payment of the bill will correctly be decided in view of r. 173 of the Rules.

[46] With regard to the case of *North Plaza* (*supra*), there can be no denial that in this case the committee of inspection was appointed at the same time as the liquidator, which is unlike the present case before this court.

[47] In that sense it was intended in *North Plaza* (*supra*) that the liquidators must work together with the committee of inspection and not with disregard of the same in the sale of the land.

[48] Accordingly in this case Zulkefli CJ Malaya said:

> The terms of the consent order are clear. The liquidator was appointed together with a committee of inspection. It is hence a mandatory requirement that a committee of inspection be established. However, the liquidator failed to establish a committee of inspection or summon a meeting of creditors and contributories for that purpose. Instead, he carried out his functions on his own despite the fact that his appointment was made 'bersama dengan Jawatankuasa Pemeriksaan'. The liquidator has thus acted in contravention and breach of the consent order.

[49] Hence from the above passage quoted, the requirement for the action of the liquidator in disposing the land must be consented and agreed by the committee of inspection is only peculiar to that case because the consent order requires the role of the committee to be exercised.

[50] Only in that context was it expected the actions of the liquidator must be taken in the knowledge of the committee of inspection and likewise be sanctioned by the same.

[51] That case is therefore distinguishable from the present case before this court and it was inappropriate with respect to quote it for the consideration of this court.

[52] With regard to the Singapore's case of *Re Micropolis* (*supra*) which decided that bills sent to liquidators must be taxed, it is relevant to note that although the learned judge in that case is concerned with the provision of r. 173 of the Singapore Companies (Winding-Up) Rules which is in *pari materia* with our r. 173 of the Rules, to the point of suggesting an amendment to it, the learned judge basically had no choice but to recognise that the provision requires the bill to be taxed.

[53] Until and unless it is amended, the learned judge was merely following the letter of the law in requiring the bill to be taxed.

[54] Likewise, this court would be wrong to ignore the clear words of our r. 173 of the Rules and as it now stands, the provision must be given effect, of course until there is amendment if any.

[55] There is a need also for this court to make a comment on the case of *Goh Swee Oh & Ors v. Heng Ji Keng & Anor* [2011] 6 CLJ 812 cited by the PLs in support of their contention that the solicitor's bills need not be taxed and should be left to them for payment.

[56] First, it is most important to note that nowhere in this case was the court referred to the provision of r. 173 of the rules for its consideration. Second, it is also crucial to remember that neither was s. 236(1)(e) of the Act an issue before the court as it is now is before this court.

[57] Further in this case the court was dealing with remuneration for the liquidators, a subject unlike the application being contested before this court now.

[58] And it was only in this context that the learned judge Varghese George JC (as he then was) ruled:

> To me, in a situation where there is no Committee of Inspection in place **(to fix remuneration of a liquidator)**, it would make no sense at all to impose a condition that the private liquidator appointed by the court to take charge of winding-up process, must in all instances approach the court first for approval before **being paid remuneration** from available funds of the company under liquidation. (emphasis added)

[59] It was also in the context of payment for the liquidators' remuneration that the learned judge further ruled: A

> There are sufficient safeguards in the statutes, including for shareholders (s. 305), to check the liquidator in so far as the latter issue of reasonableness of **their remuneration** and expenses are concerned or generally their conduct in that capacity. (emphasis added). B

[60] Further, it must stand out that when the court dealt with the issue of payment to solicitors for the work done in assisting the liquidators, it was in relation to litigation matters or court C proceedings, similar to the one in the case of *Wong Sin Fan* (*supra*) but not similar to the present case before this court as in this case before this court, as explained earlier it was only for 'ordinary administrative and management duties of the liquidators'.

[61] Therefore here too with respect, the citation of this case is D inappropriate as the facts of *Goh Swee Oh* (*supra*) is to a large extent different from the present case before this court.

Conclusion

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[62] Rule 173 must apply in this case before this court since the appointment of solicitors was pursuant to s. 236(1)(e) of the Act. Thus the solicitor's bills must be taxed when the appointment of solicitors is made only to assist the PLs in their ordinary duties.

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[63] Appointment of solicitors under s. 236(1)(e) of the Act is only in relation to 'ordinary administrative and management duties of the liquidators' as found by the Federal Court in *Wong Sin Fan* (*supra*). This is opposed to appointment under s. 236(2)(a) of the Act which appoint lawyers for legal proceedings. G

[64] In the former the bill must be taxed but in the latter, there is no such requirement.

[65] Based on the foregoing, this court makes an order that the solicitor's bills in this case must be taxed by the taxing officer and H approved by the committee of inspection that is to be formed.

[66] No costs would be granted for this application as this court is of the opinion that the PLs were merely asking for direction with regard to the payment of the solicitor's bills. I